Office - Supreme Court, U.S.
FILED
APR 6 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1047

In the Supreme Court of the United States

OCTOBER TERM, 1983

FRANKLIN JEFFERSON, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
ROSALIND AVNET LAZARUS
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly found that there was a sufficient basis on which to conclude that the district court did not abuse its discretion in limiting to $6,000 an award of attorney's fees to petitioner.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	6
Appendix A	1a
Appendix B	3a
Appendix C	7a
Appendix D	12a
Appendix E	13a

TABLE OF AUTHORITIES

Cases:

Hensley v. *Eckerhart*, No. 81-1224 (May 16, 1983)	4
Kerr v. *Screen Extras Guild, Inc.*, 526 F.2d 67, cert. denied, 425 U.S. 951	3, 4

Statute:

Civil Rights Act of 1964, Title VII, 42 U.S.C. (& Supp. V) 2000e *et seq.*	2
42 U.S.C. 2000e-5(k)	3
42 U.S.C. 2000e-16(d)	3

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1047

FRANKLIN JEFFERSON, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not reported. The opinion of the district court (Pet. App. C1-C11) is not reported. An earlier opinion of the court of appeals (App., *infra*, 1a-2a) is not reported. Two earlier opinions of the district court (App., *infra*, 3a-6a, 7a-11a) and two judgment orders of the district court (App., *infra*, 12a, 13a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1983, and a petition for rehearing was denied on September 28, 1983 (Pet. App. B1-B2).

The petition for a writ of certiorari was filed on December 24, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a black male employed by the United States Army Corps of Engineers, brought this action in the United States District Court for the District of Oregon, alleging that the Corps had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*, by discriminating against him on the basis of race.[1] In his complaint petitioner alleged six different respects in which the Corps allegedly had discriminated against him.[2] Following a trial, the district court held that the Corps had discriminated against petitioner in three respects, *i.e.*, by restricting his use of sick and annual leave, by placing him on leave without pay status, and by harassing him.[3] The court rejected petitioner's claim that

---

[1] Petitioner initially submitted his allegations of discrimination to the Corps' District Engineer. The District Engineer determined that petitioner had not been subjected to racial discrimination, and the agency affirmed that determination in 1975. The Civil Service Commission affirmed the agency decision in 1976. App., *infra*, 7a-8a.

[2] In 1978, the district court preliminarily enjoined the Corps from terminating petitioner during the pendency of the action. The court subsequently denied a permanent injunction. In January 1980, the district court, on petitioner's ex parte motion, temporarily restrained the Corps from terminating him. The court dissolved that order in February 1980. See Pet. App. C7; App., *infra*, 5a.

[3] The court subsequently held that petitioner was entitled to receive 364 hours of accumulated sick leave, 240 hours of accumulated annual leave, and the sum of $6,244.81, covering compensation for additional annual leave, leave without pay, and expenses incurred to obtain medical certification in connection with sick leave. App., *infra*, 4a-6a, 12a.

the Corps had discriminated against him in the assignment of work, in the allocation of overtime, or in his suspension from work for presenting altered sick leave slips. App., *infra*, 9a-10a. Pursuant to 42 U.S.C. 2000e-5(k) and 16(d), under which courts are authorized to award reasonable attorney's fees to prevailing parties in Title VII suits, petitioner moved for an award of attorney's fees in the amount of $90,752.70.[4] The district court awarded attorney's fees of $6,000. Pet. App. C2; App., *infra*, 12a, 13a.

2. On the initial appeal the court of appeals affirmed on all issues except the award of attorney's fees. App., *infra*, 1a-2a. The court of appeals remanded the issue of attorney's fees for consideration in light of the guidelines set out in *Kerr* v. *Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976). App., *infra*, 2a. On remand the district court noted that it had considered each of the factors set out in *Kerr*, and it discussed in some detail the factors it viewed as particularly relevant to the determination in this case. Pet. App. C4. The court noted, inter alia, the excessive number of hours spent on the case (including 697 hours for consultation with the client, 60 hours in answering 25 interrogatories, and 43 hours for consultation between petitioner's counsel), the fact that petitioner had not prevailed on three of his claims and had twice failed to obtain a permanent injunction, the court's judgment that the quality of petitioner's representation was "unusually bad," and

---

[4] Following the initial appeal, petitioner requested an additional $14,032.20 in attorney's fees. The petition states (at 8, 21, 25) that the total attorney's fees requested amounted to $112,000.

its conclusion that certain flat rates charged by one of petitioner's counsel were "totally out of proportion to the time spent in court." *Id.* at C4-C9.

3. The court of appeals affirmed, noting that the determination of attorney's fees was appropriately guided by the factors listed in *Kerr* v. *Screen Extras Guild, Inc.*, *supra*, and that there was support in the record for the district court's findings concerning the unreasonable and duplicative nature of some of the hours claimed, petitioner's lack of success on many of his claims, and the "less than exemplary" performance of his counsel. The court of appeals concluded that it was unable to say that the district court had abused its discretion in setting the fees at $6,000. Pet. App. A1-A2.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 9-14) that the court of appeals erred in not requiring a calculation of attorney's fees based on a reasonable number of hours and a reasonable rate, citing *Hensley* v. *Eckerhart*, No. 81-1244 (May 16, 1983). But in *Hensley* the Court did not hold that such a calculation is always necessary; instead, it stated that "[t]here is no precise rule or formula" for determining whether a fee award should be adjusted downward (slip op. 12). The Court also stressed that the district court "necessarily has discretion in making this equitable judgment" (*ibid.*).

In any event, it seems clear that the district court did make a calculation of reasonable attorney's fees in this case. The court concluded that rates of $35

per hour for Mr. Raines and $50 per hour for Mr. Oler were reasonable. It rejected Mr. Oler's rate of $100 per hour and his flat rates for court appearances and explained why the rates appeared unreasonable. Pet. App. C8-C9. The district court also concluded that the number of hours claimed should be reduced because it included excessive and duplicative claims, of which the court gave several examples (*id.* at C4-C6), and it described other factors, such as degree of success and quality of representation, that indicated the need for further discounts (*id.* at C7-C8).[5] The court of appeals found sufficient support in the record for all of these findings. Although the district court did not provide a precise explanation of how it computed the total of $6,000, it provided enough information to allow the court of appeals to conclude that the district court used the correct standards and that the amount of the award did not reflect an abuse of discretion. Pet. App. A2. In these circumstances, the district court's failure to explain each and every step in its calculation cannot be characterized as reversible error.

2. Petitioner also contends (Pet. 14-24) that the district court failed to articulate clearly the reasons for the attorney's fees it awarded. That contention is without substance.

Petitioner concedes (Pet. 15-16) that a court is not required to discuss specifically all 12 factors the courts have suggested as guidelines for determination of attorney's fees and that the factors are flexible

---

[5] Petitioner's claim that he "prevailed on substantially all claims against defendants" (Pet. 10) is incorrect. As the district court noted (Pet. App. C7), petitioner prevailed on only three of his six discrimination claims, and both of his requests for a permanent injunction were denied.

guidelines that need not be applied mechanically. The district court indicated (Pet. App. C4) that it had considered all 12 of the factors, and, as petitioner acknowledges (Pet. 17), it discussed six of the factors. The district court opinion on its face clearly states the considerations that led the court to reduce very substantially the amount requested for attorney's fees. Nothing in the petition suggests that the district court's conclusions were clearly erroneous.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ROSALIND AVNET LAZARUS
Attorney

APRIL 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-3035

FRANKLIN JEFFERSON, PLAINTIFF-APPELLANT

vs.

MARTIN R. HOFFMAN, ET AL., DEFENDANTS-APPELLEES

Argued and Submitted—June 11, 1981

Decided—September 2, 1981

On Appeal from the United States District Court
for the District of Oregon
Hon. Robert C. Belloni, District Judge, Presiding

MEMORANDUM

Before: HUG, POOLE and REINHARDT, Circuit Judges.

In this Title VII action, the district court gave judgment awarding Jefferson the money equivalent ($6,244.81) of 604 hours of accumulated annual and sick leave of which he had been deprived by the defendants in violation of the statute. It also awarded him $6,000 (against his claim for $90,000) as attorneys' fees, and dissolved a preliminary injunction which had restrained the defendants from discharging him. When the defendants again threatened his termination for reasons similar to those which had been the subject of the restraint, the court granted a temporary restraining order but dissolved

it some weeks later (having ordered additional fees of $533.30 in connection with the TRO) after the defendants agreed to withdraw the notice of termination.

On appeal Jefferson cites as error a number of rulings all of which we affirm except that relating to the calculation of attorneys' fees.

We find no abuse of discretion in vacating the preliminary injunction and denying the request for a permanent injunction. *Miss Universe Inc.* v. *Flesher*, 605 F.2d 1130 (9th Cir. 1979). The court properly concluded that the defendants had taken steps to prevent reoccurrence of discriminatory acts and that an injunction against future harassment would be difficult to enforce.

Nor did the court abuse discretion in making local counsel primarily responsible for Jefferson's court appearance. *Raiford* v. *Pounds*, 640 F.2d 944 (9th Cir. 1981).

The ruling that Jefferson was not discriminated against in the distribution of overtime was not clearly erroneous. *Smallwood* v. *National Can Co.*, 583 F.2d 419 (9th Cir. 1978).

It was proper to deny compensatory and punitive damages in a Title VII case. *Shah* v. *Mt. Zion Hospital & Medical Ctr.*, 642 F.2d 688 (9th Cir. 1981).

There was no error in limiting the scope of the trial to the events at the John Day Dam. *Smallwood*, *supra*.

On this record we cannot give meaningful review to the reasonableness of the award of attorneys' fees because the district court failed to articulate its resolution of the guidelines outlined in *Kerr* v. *Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975). We remand for that purpose.

REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 77-11

FRANKLIN JEFFERSON, PLAINTIFF

vs.

MARTIN R. HOFFMAN, ETC. ET AL, DEFENDANTS

OPINION

BELLONI, Judge:

This is an employment discrimination case. Plaintiff, a black journeyman crane operator brought suit against his employer, the Army Corps of Engineers. Plaintiff alleged six instances of racial discrimination. This court granted relief with respect to three. They are: 1) harassment; 2) restriction in annual and sick leave usage; and 3) placement on leave without pay status. The parties filed simultaneous briefs concerning the amount of damages and the character of relief.

Specifically, since July 1975, defendants have required plaintiff to produce medical certification for all sick leave usage. When plaintiff was unable to obtain medical substantiation, he was forced to use accumulated annual leave. If plaintiff's annual leave was exhausted, he was placed on leave without pay status. Defendants also required plaintiff to give three days advance notice before using any annual

leave. If plaintiff attempted to use annual leave without the requisite notice, he was placed on leave without pay status. This court found the imposition of restrictions on plaintiff's sick and annual leave usage were not justified.

Remedies under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, encompass injunctive and affirmative relief, "and any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g). A full range of equitable remedies is available to the court. *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975).

Since Magistrate Leavy ruled earlier that plaintiff would not be entitled to recover compensatory or punitive damages in this Title VII action, it is unnecessary to discuss those aspects of recovery.

Damages for harassment would be measured in terms of mental distress. As such, they are compensatory in nature, and therefore are not recoverable. Injunctive relief is not appropriate. A broad injunction against harassment would be ambiguous, and difficult to check and enforce.

Regarding sick leave, defendants are ordered to restore all of plaintiff's accumulable sick leave, for the period beginning July 1975 through December 1978. At four hours every two week pay period, for three and a half years, plaintiff is entitled to three hundred sixty-four hours of accumulated sick leave.

With respect to annual leave, defendants are ordered to restore all of plaintiff's annual leave, for the period beginning July 1975 through December 1978, in the following manner. Plaintiff will be restored the maximum two hundred and forty hours of accumulated annual leave. The balance will be paid to plaintiff in a lump sum equal to $4,658.60.

Both the accumulated sick and annual leave is currently available for plaintiff's use.

After reviewing both sides' claims and calculations, plaintiff is entitled to recover $366.21 for his placement on leave without pay status.

In connection with the improper sick leave requirement, plaintiff made numerous trips from The Dalles to visit doctors in Portland. Plaintiff is entitled to recover $1,220.00 for expenses incurred while obtaining the required medical certification.

The court granted plaintiff's motion for preliminary injunction and enjoined defendants from removing plaintiff from his position as crane operator. The preliminary injunction was issued during the pendency of the action. Plaintiff asks that it be made into a permanent injunction, preventing defendants from terminating him in the future. Defendants ask that the preliminary injunction be dissolved.

The preliminary injunction is dissolved. The administrative process stayed by the injunction is allowed to continue. There is no reason to believe defendants and their employees will not do their best to correct the problem areas identified by this court. Defendants have already initiated a program which will improve the situation which led to this action.

Plaintiff has made several requests. First, that this court order his transfer to a metropolitan area, at no loss of seniority, and to a position commensurate with his abilities. Second, that this court order the termination of eight individuals who testified against plaintiff at trial. Both requests are denied. The latter is frivolous.

Additionally, plaintiff claims: 1) medical expenses resulting from tension; and 2) his costs for the

litigation (telephone calls to counsel, motel and automobile expenses). These are denied. Finally, plaintiff's request that this court reconsider and expand its findings is also denied.

Plaintiff is therefore entitled to recover: 1) three hundred and sixty-four hours of accumulated sick leave; 2) two hundred and forty hours of accumulated annual leave, and the sum of $4,658.60; 3) the sum of $366.21; and 4) the sum of $1,220.00 from defendants. The preliminary injunction is dissolved.

The foregoing shall constitute supplemental findings of fact and conclusions of law according to Rule 52(a) of the Federal Rules of Civil Procedure.

Dated this 1st day of August, 1979.

/s/ Robert Belloni
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 77-11

FRANKLIN JEFFERSON, PLAINTIFF

vs.

MARTIN R. HOFFMANN, ETC. ET AL., DEFENDANTS

OPINION

[Filed Apr. 20, 1979]

BELLONI, Judge:

Plaintiff, a black male, has brought suit against his employer, the United States Army Corps of Engineers, alleging discrimination in employment as a journeyman crane operator. This court has jurisdiction under Title VII of the Civil Rights Acts of 1964, as amended, 42 USC § 2000e *et seq.*, and 28 USC § 1343.

Plaintiff was employed at Bonneville Dam by defendants from 1971 to 1974. He is currently employed at The Dalles-John Day dams and has been permanently assigned there since mid-1974.

Plaintiff filed an administrative complaint which gave rise to this action on July 10, 1975. The District Engineer issued his notice of proposed decision on October 23, 1975, which became the final agency

decision on November 10, 1975. Plaintiff appealed to the Civil Service Commission, which issued its decision affirming the agency decision on December 2, 1976. Plaintiff timely filed suit on January 5, 1977.

The court granted plaintiff's motion for preliminary injunction enjoining defendants from removing him from his position as crane operator at The Dalles-John Day dams on February 8, 1978. The preliminary injunction was issued during the pendency of the action.

Plaintiff's complaint alleged that defendants initiated and maintained a continuing pattern of discriminatory actions from 1971 to the present. I have previously limited the trial to those occurring during his employment at the John Day Dam on the ground that the earlier acts are separate and not relevant.

The trial on the merits included the testimony of thirteen witnesses for the plaintiff, and sixteen witnesses for the defendant. The evidence was designed to show racial discrimination as follows:

1) compulsion to perform extra duties consisting of menial and undesirable work assignments;

2) denial of overtime work;

3) improper suspension;

4) continued harassment on the job consisting of, but not limited to, unwarranted close scrutiny of his activities as an employee, and subjugation to ridicule and racial slurs;

5) restriction in the use of sick and annual leave; and

6) placement on leave without pay.

Plaintiff's first three allegations are without merit. Relief will be granted upon the remaining three.

First, plaintiff claims he was compelled to perform menial, undesirable work. Plaintiff's claim is without merit. Plaintiff's job description requires him to perform "other duties as assigned". Such duties may encompass non-crane tasks which are necessary to accomplish the job to which a particular crew has been assigned. All employees, regardless of rank, may be required to do work which could be considered menial or undesirable. The efficient completion of work requires all members of a team to work together toward the goal of completing the work that needs to be done. Testimony showed that plaintiff on occasion, completely refused to do assigned non-crane work, or if he did undertake it, he did it slowly and inefficiently.

Second, plaintiff complains of inequities in the allocation of overtime. The evidence established that plaintiff was not denied overtime in an unfair manner. Assignment of overtime is based on a number of factors, including the employee's availability and willingness to work, and the skills he possesses. Since plaintiff preferred to only operate a crane, while the other crane operators were able and willing to perform non-crane tasks, plaintiff through his own actions limited his amount of overtime.

Third, plaintiff claims he was improperly suspended for sick leave abuse in December 1976. Plaintiff was suspended for presenting questionable medical slips signed by his physician to support his absences from work. There is sufficient evidence justifying plaintiff's suspension.

Fourth, plaintiff alleges that he was the victim of continued harassment. There is sufficient evidence to

support plaintiff's allegation. Significantly, the project engineer directed a secretary not to notify plaintiff of his telephone messages during the day, some of which involved the investigation and processing of his discrimination complaints. This is improper conduct, and is indicative of a discriminatory attitude. Further, since his arrival at The Dalles-John Day dams, plaintiff has been subjected to constant close, unwarranted scrutiny. He has been the victim of racial slurs. The defendants' attempted corrective and preventative measures were ineffective, and made only half-heartedly.

Lastly, plaintiff contends that defendants, without cause, imposed unreasonable restrictions upon his use of sick and annual leave. Plaintiff also challenges instances of his placement on leave without pay status. Since July 1975, defendants have required plaintiff to produce medical certification for all sick leave usage. This resulted in plaintiff having to drive ninety miles from The Dalles to Portland, to obtain substantiation from his physician. When plaintiff was not able to obtain medical substantiation, he was forced to use accumulated annual leave. If plaintiff's annual leave was exhausted, he was placed on leave without pay. Defendant also required plaintiff to give three days advance notice before using any annual leave. If plaintiff attempted to use annual leave without the requisite prior notice, he was placed on leave without pay status.

After considering all the evidence, I find the imposition of the restrictions on plaintiff's sick and annual leave usage were not justified. Consequently, those instances when plaintiff was placed on leave without pay status, resulting from attempted sick and annual leave usage, are also improper. Thus, plaintiff's final two contentions are valid.

Therefore, I find that plaintiff has established a prima facie case of employment discrimination, and that defendants have failed to rebut it by articulating legitimate non-discriminatory reasons justifying its actions.

The parties shall file simultaneous briefs in the amount of damages and the character of relief which is appropriate. These should be filed on May 18, 1979.

The foregoing shall constitute findings of fact and conclusions of law according to Rule 52(a) of the Federal Rules of Civil Procedure.

Dated this 30 day of April, 1979.

/s/ Robert Belloni
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Cv. No. 77-11-BE

FRANKLIN JEFFERSON, PLAINTIFF

v.

MARTIN R. HOFFMAN, ETC. ET AL., DEFENDANTS

[Filed Nov. 19, 1979]

Plaintiff shall recover from defendants:

1. three hundred and sixty-four hours of accumulated sick leave;
2. two hundred and forty hours of accumulated annual leave and the sum of $4,658.60;
3. the sum of $366.21; and
4. the sum of $1,220.00.

The preliminary injunction is dissolved.

Plaintiff shall recover costs. Plaintiff shall also recover attorneys' fees in the sum of $6,000.00.

The remaining portions of this action are dismissed.

Dated: November 19, 1979.

/s/ Robert Belloni
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Cv. No. 77-11-BE

FRANKLIN JEFFERSON, PLAINTIFF

v.

MARTIN R. HOFFMAN, ETC. ET AL., DEFENDANTS

ORDER

[Filed Nov. 19, 1979]

Plaintiff is entitled to attorneys' fees in the sum of $6,000.00.

Dated: November 19, 1979.

/s/ Robert Belloni
United States District Judge

U. S. GOVERNMENT PRINTING OFFICE: 1984 421023 930